

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 06 December 2005

BALCA Case No.: 2004-INA-00355
ETA Case No.: P2003-NY-02495307

In the Matter of:

NY INSTITUTE OF BUSINESS TECHNOLOGY,
Employer,

on behalf of

PATRICIA GARCIA,
Alien.

Appearance: Juan Rivera, Esquire
Brooklyn, New York
For the Employer and the Alien

Certifying Officer: Dolores DeHaan
New York, New York

Before: **Burke, Chapman, and Vittone**
Administrative Law Judges

John M. Vittone
Chief Administrative Law Judge

DECISION AND ORDER
ON RECONSIDERATION

This matter arises from Employer's application for permanent alien labor certification pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act, 8

U.S.C. § 1182(a)(5)(A) (“the Act”), and Title 20, Part 656 of the Code of Federal Regulations.¹

PROCEDURAL BACKGROUND

AND MOTION FOR RECONSIDERATION

On March 10, 2001, the New York Institute of Business Technology² (“Employer”) filed an application for labor certification on behalf of Patricia Garcia (“Alien”) to fill the position of Cleaning Supervisor. AF at 72-76. By Final Determination dated March 31, 2004, a U.S. Department of Labor Certifying Officer (“CO”) denied Employer’s application. Thereafter, Employer requested formal review before the Board of Alien Labor Certification Appeals (“Board”).

On September 28, 2005, the Board issued a Decision and Order vacating the CO’s determination and remanded the case back to the appropriate State Workforce Agency for further recruitment proceedings pursuant to *Compaq Computer Corp.*, 2002-INA-00249 (Sept. 3, 2003) (holding that when a CO denies a request Reduction in Recruitment (“RIR”) processing, the proper procedure is to remand the case to the appropriate state workforce agency for regular processing).

On November 15, 2005, the CO filed a Motion for Reconsideration requesting that the Board vacate its September 28, 2005 Decision and Order and reconsider the case on its merits due to a mistake that materialized because of the Board’s “apparent misunderstanding...of the procedural history of the case.” CO’s Motion for Reconsideration at 1, fn 1 (Nov. 9, 2005). Specifically, the CO maintains that after it

¹ The application was filed prior to the effective date of the “PERM” regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2005). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

² On or about February 21, 2002, Employer changed its name to the New York Institute of English and Business, Inc. Employer’s Position Statement, at 3 (Oct. 15, 2004); AF 1.

initially denied Employer's request for RIR, it in fact returned the matter to the state for new recruitment on July 16, 2003. *See* AF 66. Based on the results of that supervised recruiting effort, the CO then denied Employer's application for failure to reject seemingly qualified U.S. applicants solely for lawful, job-related reasons under 20 C.F.R. §§ 656.21(b)(6) and 656.20(c)(8). Accordingly, the CO requests that the Board reconsider its September 28th Decision and Order and affirm the CO's denial of Employer's application. On December 1, 2005, Employer's counsel submitted the following short response: "We stand on the record and agree with the Judge's Decision. We thereby believe that the Judge's order should not be overturned."

It is well-settled that the Board has the inherent authority to reconsider its decisions. *Edelweiss Manufacturing Co., Inc.*, 1987-INA-562 (Nov. 10, 1988) (*en banc*) ("Administrative agencies have inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider.") citing *Trujillo v. General Electric Co.*, 621 F.2d 1084, 1086 (10th Cir. 1984) and *Albertson v. Federal Communications Commission*, 182 F.2d 397, 399 (D.C. Cir. 1950). That authority is left to the Board's discretion, and the Board's denial of a request for reconsideration will only be reversed for clear abuse of discretion. *Edelweiss Manufacturing*, 1987-INA-562 (citations omitted). Reconsideration is proper when a party points out a flaw in the judicial process by which the Board reached its decision, or that the Board overlooked some important fact. *Id.*

While neither the Rules of Practice and Procedure Before the Office of Administrative Law Judges, 29 C.F.R. Part 18, nor the regulations governing permanent labor certification, 20 C.F.R. Part 656, expressly address motions for reconsideration, Section 18.1 of Title 29 provides the means by which an administrative law judge may entertain such a request:

The Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation.

29 C.F.R. § 18.1(a). Thus, through the application of Section 18.1(a), the Board has held—by way of Rule 59(e) of the Federal Rules of Civil Procedure—that a motion for reconsideration must be filed within 10 days following the issuance of the Decision and Order:

Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.

Fed. R. Civ. P. 59(e) (2005); *See Lignomat, USA, Ltd.*, 1988-INA-276 (Jan. 24, 1990) (order denying motion for reconsideration).

The Federal Rules of Civil Procedure also arm a court with a mechanism by which it may—under certain circumstances—correct a mistake in judgment beyond the 10-day period:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Fed. R. Civ. P. 60(b) (2005).

After careful review of our September 28, 2005 Decision and Order and the case file, it is apparent that the Board issued the decision under the mistaken belief that no

supervised recruitment had taken place following denial of the RIR request. This was clear error. Although Employer filed a formal objection to the CO's motion, it did not proffer a single justification for denying the CO's request. Thus, while the CO's Motion for Reconsideration was filed beyond the 10-day period enunciated in *Lignomat, USA*, we—in the interests of fairness and justice—grant the CO's request and reopen the Board's previous judgment for reconsideration pursuant to Rule 60(b)(1) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

As noted above, on March 10, 2001, Employer filed an application for labor certification to fill the position of Cleaning Supervisor. AF 58-59, 72-76. The job duties for the position included supervision and coordination of 4 workers in janitorial work, training of new workers, maintenance of time and production records, and hiring, assignation, and firing of personnel. AF 72. Employer required a minimum of two years of work experience in the job offered. An advertisement for the position ran in a local newspaper on March 23 and 25, 2001, and an announcement was posted on Employer's premises from March 23, 2001 to April 10, 2001. AF 70-75. This initial recruitment yielded no applicants, and on April 20, 2001, Employer requested Reduction in Recruitment ("RIR") processing, which was denied on July 16, 2003. AF 66, 69.

Employer was directed to re-advertise the job position. On July 28, 2003, the CO notified Employer that its advertised hourly wage of \$19.62 fell short of the prevailing wage, which the 2001 Occupational Employment Statistics' ("OES") survey set at \$22.39 per hour. AF 62. Employer submitted an amended ETA 750 form listing the hourly wage as \$22.39 on August 18, 2003, and advertised the position for a second 10-day period with the new wage listed. AF 54, 57-61.

Thereafter, a total of 17 applicants submitted resumes. Employer's attempts to contact them via certified mail yielded four available applicants who interviewed with Employer in late October 2003. AF 26, 28-31. Employer rejected those applicants. On

January 14, 2004, the CO issued a Notice of Findings proposing to deny certification, noting that an employer may reject U.S. applicants solely for lawful, job-related reasons under 20 C.F.R. §§ 656.21(b)(6) and 656.20(c)(8). AF 21-23. The CO noted further that Employer failed to “adequately establish” that two particular U.S. applicants were rejected solely for lawful, job-related reasons, as each seemingly met the minimum job requirements described in the ETA 750.

Employer timely filed its rebuttal on March 19, 2004, attempting to explain its justifications for rejecting the two U.S. applicants. AF 18. In her Final Determination dated March 31, 2004, the CO stated that Employer’s rebuttal regarding U.S. Applicant Hale was accepted. However, the CO denied certification pursuant to Sections 656.21(b)(6) and 656.20(c)(8), rejecting Employer’s justification for not hiring U.S. Applicant Colon. AF 16. Specifically, the CO rejected Employer’s contention that U.S. Applicant Colon’s prior experience included a significant amount of other duties not required by the job offered and, therefore, did not possess the equivalent of two years of experience performing the specific duties listed on the ETA 750. Acknowledging that U.S. Applicant Colon did in fact perform many of the additional duties listed by Employer, the CO nevertheless concluded that U.S. Applicant Colon possessed “more than 10 years of experience in the job offered,” and “there is no evidence that the additional duties that the applicant performed in his prior positions would render him incapable of satisfactorily performing the duties required.” AF 16.

By letter dated April 30, 2004, Employer requested formal review of the CO’s Final Determination. AF 4. The Board of Alien Labor Certification Appeals docketed the case on September 15, 2004.

DISCUSSION

It is well-settled that the employer bears the burden of proof in certification applications. 20 C.F.R. § 656.2(b); *see Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997). Federal regulations at 20 C.F.R. § 656.21(b)(6) require an employer to

document that if U.S. workers applied for the job opportunity, they were rejected solely for lawful, job-related reasons. Section 656.20(c)(8) requires that the job opportunity must be clearly open to any qualified U.S. workers; implicit in these requirements is an employer's obligation to conduct a *bona fide* recruitment effort for U.S. workers. 20 C.F.R. § 656.20(c)(8); *H.C. LaMarche Enter., Inc.*, 1987-INA-607 (Oct. 27, 1988).

When he or she meets the minimum qualifications for the job, an applicant is considered qualified and labor certification is properly denied when the employer fails to establish that the applicant was not qualified, available, willing or able to accept the position as advertised. *Cativelos Constr., Inc.*, 2002-INA-149 (July 14, 2003). Here, Employer rejected U.S. Applicant Colon because, according to Employer's theory, his experience in maintenance did not amount to two years of experience, as many of his prior positions involved other duties. However, even a passing examination of the applicant's resume leads us to the conclusion that he does meet the minimum qualifications for the job offered. To be sure, U.S. Applicant Colon's resume clearly demonstrates that he possesses many more than two years of supervisory and maintenance experience as a housekeeping supervisor. Many of the duties described in his resume are reasonably comparable—if not identical—to those stated in the ETA 750. Therefore, we find that U.S. Applicant Colon meets the minimum qualifications for the job offered, and the CO, therefore, properly denied certification.

In addition, Employer has presented a new—albeit unpersuasive—justification for rejecting U.S. Applicant Colon within its formal request for review before the Board. Employer claims on appeal that during his interview, U.S. Applicant Colon expressed unwillingness to work in an environment in which he would have to “supervis[e] the sanitary needs of females,” which “was not within his comfort zone.” Employer's Position Statement, at 2. According to Employer, U.S. Applicant Colon had prior experience supervising only men and men's facilities; having to maintain facilities that “almost exclusively service[] female students and staff” did not make the applicant comfortable, according to Employer. We observe, however, that at no time during the rebuttal phase or any other time prior to the CO's Final Determination did Employer

present this dubious justification for rejecting U.S. Applicant Colon. Instead, Employer clearly maintained that U.S. Applicant Colon did not possess the necessary years of maintenance experience. AF 29 (“He had no experience in maintenance, cleaning, etc. All of his positions were office work, payroll, etc. He later advised me that his interest was to continue working as an office clerk.”).

Employer’s newly-crafted and bald assertion regarding the applicant’s unwillingness to work in a female-dominated environment is not supported by a shred of evidence in the record. There is nothing in the record supporting Employer’s conclusion regarding the applicant’s willingness or unwillingness to work with females; nor is there anything establishing that the place of business caters primarily to females. Bare assertions without supporting reasoning or evidence are generally insufficient to carry an employer’s burden of proof. *Custom Card d/b/a Custom Plastic Card Company*, 1988-INA-212 (Mar. 16, 1989) (*en banc*); *see generally Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). Even assuming that Employer’s assertions are credible and persuasive, rebuttal following the NOF is the employer’s last chance to make its case. Thus, it is the employer’s burden at that point to perfect a record that is sufficient to establish that a certification should be issued. *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*). In other words, irrespective of the fact that its argument is not supported by evidence, Employer’s newly proffered justification presented for the first time along with its request for review cannot be considered by the Board.³

³ *See Huron Aviation*, 1988-INA-431 (July 27, 1989) (holding that where an argument made after the Final Determination is tantamount to an untimely attempt to rebut the NOF, the Board will not consider that argument).

ORDER

IT IS ORDERED that our September 28, 2005 Decision and Order in this matter is **VACATED**. Upon reconsideration, the Certifying Officer's denial of labor certification is **AFFIRMED**.

For the Panel:

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John M. Vittone
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.